TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 869.

GEORGE P. HUNT, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED JUNE 25, 1885.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 *I. Petition. Filed November* 25, 1884.

In the Court of Claims. Term 1883, 1884.

GEORGE P. HUNT
vs.
THE UNITED STATES. } No. 14504.

The petition of George P. Hunt respectfully shows that he is a citizen and resident of the United States, who has ever borne true allegiance thereto; that he is the sole owner of the claim stated in this petition; that no part of the same has ever been sold, assigned, transferred, paid, or discharged, and that no action has been taken thereupon except that the same has been duly presented to and disallowed by the Fourth Auditor and the Second Comptroller of the Treasury.

That on or about the 30th day of Nov'r, A. D. 1868, the petitioner was a first assistant engineer in the navy, and had been such continuously for more than two years, and that on or about the date named he completed two years' sea service in such grade and office, and thereupon and thereby became entitled to an examination for promotion to the grade and office of chief engineer in the navy.

That on or about the 20th day of October, 1880, he was subjected to an examination for promotion by order of the Honorable Secretary of the Navy, and having passed such examination was promoted to said grade and office of chief engineer, to rank as such from July 4th, 1880.

2 That no examination of the petitioner for promotion was held or ordered between the dates or times above mentioned, nor was the delay in ordering or holding such examination requested, caused by, procured, assented to, or in any manner the fault of the petitioner.

That upon the promotion of the petitioner to the said grade of chief engineer he became by law entitled to the pay and emoluments of such grade (less the amounts received by him from time to time, as representing the pay and emoluments of the grade next below) from or about the said thirtieth day of November, 1868, to or about the fourth day of July, 1880, both inclusively, but hath not received the same.

Wherefore the petitioner prays judgment in such sum as shall represent the difference between the pay and emoluments of a chief engineer between the dates last above named and the amounts received by him as pay and emoluments between those dates, to be hereafter ascertained from the proof to be adduced in support of this petition, and which sum (so to be ascertained and fixed) he claims to be justly his due, exclusive of all valid credits and offsets.

CHAS. F. BENJAMIN,
Attorney.

STATE OF MASSACHUSETTS, }
County of Suffolk, } *ss:*

George P. Hunt, being duly sworn, deposes and says that he is the

petitioner above referred to, and that he has read the foregoing petition, and that the statements therein contained are true to the best of his knowledge and belief.

GEO. P. HUNT.

Subscribed and sworn to before me this fifteenth day of November, A. D. 1884.

[SEAL] B. S. FISKE,
Notary Public.

3 *II. Traverse. Filed December* 10, 1884.

And now comes the Attorney General on behalf of the United States, and, answering the petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Goverment of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney General, in pursuance of the statute in such case provided, denies the said allegations and asks judgment accordingly.

THOMAS SIMONS,
Ass't Attorney General.

4 *III. Submission of the Case.*

GEORGE P. HUNT
vs.
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At a Court of Claims held in the city of Washington on the 30th day of March, A. D. 1885, this case was submitted by Mr. Benjamin for the claimant, and Mr. Assistant Attorney General Simons for the defendants, for the purpose of procuring the opinion of the court, and with the agreement that the decree shall be adverse to the claimant.

5 *IV. Findings of Fact and Conclusion of Law. Filed April* 27, 1885.

This case having been heard before the Court of Claims, the court, upon the evidence, finds the facts to be as follows:

I.

In 1868 the claimant was a first assistant engineer in the navy. In that grade he served two years at sea on board of a naval steamer. The two years of sea service was completed October 25, 1868.

October 25, 1868, there was no vacancy in the grade of chief engineer to which the claimant could have been promoted, nor did any such vacancy occur until July 4, 1880.

II.

The claimant was ordered to examination for promotion to the

grade of chief engineer on or about October 11, 1880, and was thereupon found qualified.

The claimant was promoted to the grade of chief engineer December 29, 1880.

The claimant has received the pay of a chief engineer since July 4, 1880.

6 From October 25, 1868, to July 4, 1880, the claimant was paid as a first assistant engineer.

The actual amount of pay and allowance received by claimant from October 25, 1868, to July 4, 1880, was $———.

III.

The navy regulations of 1865 were in force in 1867. The two hundred and sixty-fourth section of those regulations (page 48) is as follows:

264. Candidates for promotion to the grade of chief engineer must have served at least two years at sea as first assistant engineer on board of a naval steamer.

IV.

The Secretary of the Navy, May 12, 1864, addressed to the Fourth Auditor the following letter:

NAVY DEPARTMENT, 12 *May*, 1864.

SIR: The letter of 2d Ass't Engineer John Roop, referred by you to the Department, is herewith returned.

There may be some obscurity in the wording of the 16th section of the act of July 16, 1862, to which you refer, but the evidence and sole purpose of the law is to prevent an officer from being deprived by absence on duty of the increased pay which promotion

7 would have given him. Since the commencement of the present war the examinations of engineers for promotion have not been at any regular periods. It will be proper, therefore, to consider them as entitled to an examination on the expiration of the term of sea service which the regulations require them to have performed, and to allow them the increased pay from that date, if found qualified at their first examination subsequent thereto and promoted.

Very resp'y,

GIDEON WELLES,
Sec'y of the Navy.

Hon. S. J. W. Tabor, 4th Auditor.

V.

The Fourth Auditor, December 15, 1864, published the following regulations, which were approved by the Second Comptroller (revised rules in regard to the transaction of business at the office of the Fourth Auditor of the Treasury, 1864, p'r. 19, 21, 22:) 90 * * * A promoted officer of the Navy, * * * if his promotion be dependent on passing his first examination after he was entitled by regulation to be examined for that purpose, his increased pay

8 will commence on that date.

91. If he be promoted in consequence of passing successfully his first examination for promotion the increased pay, in that case, begins when he was by regulation entitled to be examined.

112. By the 16th section of the act of 16th July, 1862, an officer of the navy absent on duty when entitled to an examination, and found qualified on a subsequent examination, is entitled to the increased rate of pay "from the date when he would have received it had he been found qualified at the time when his examination should have taken place."

113. The Hon. Secretary of the Navy has given the following construction to that provision of law: "It will be proper, therefore, to consider them as entitled to an examination on the expiration of the term of sea service which the regulations require them to have performed, and to allow them the increased pay from that date if found qualified at their first examination subsequent thereto and promoted."

VI.

In 1868, when the claimant finished the two years of sea service required by regulation as a condition to promotion, the number of chief engineers in the navy was limited by law to one for each first and second class ship. At that time there were more chief engineers than there were ships of that description. This continued to be the case down to March 3, 1871, when Congress further limited the number of chief engineers to seventy.

From March 3, 1871, down to July 1, 1874, the number of chief engineers allowed by law exceeded the number actually in service; but during this period had a sufficient number of first assistant engineers been promoted to make the number of chief engineers equal that allowed by law, the claimant's number on the roll would still not have been reached. From July 2, 1874, to July 4, 1880, the number of chief engineers on the roll always equalled the number allowed by law. It was not until the latter date that the claimant's number was reached on the list of promotions, and a vacancy was then for the first time provided for him.

Conclusion of Law.

Upon the foregoing findings of facts the court decides as conclusion of law that the claimant's petition should be dismissed upon the authority of Adamson's Case (19 C. Cl's, 623), wherein was given the following opinion, changed here as to dates and amounts to meet the facts of the present case.

V. Opinion of the Court.

SCOFIELD, *J.*, delivered the opinion of the court:

October 25, 1868, the claimant was a first assistant engineer in the navy, and had at that time completed two years of sea service in that grade. He thus became eligible, under paragraph 264 of the navy regulations, to an examination for promotion to the grade of chief engineer. No vacancy, however, in the latter grade to which he could be promoted existed at that time. About twelve years

thereafter, to wit, July 4, 1880, such a vacancy for the first time occurred. October 11, 1880, he was ordered to an examination for promotion, which he successfully passed, and on December 29, 1880, he was promoted to be a chief engineer. During the intervening period, from October 25, 1868, to July 4, 1880, he received the compensation allowed by law to a first assistant engineer. From July 4, 1880, he has received the compensation of a chief engineer. He claims that by this promotion he became entitled to receive the difference between the pay of a first assistant engineer and a
11 chief engineer from October 25, 1868, when he completed two years of sea service, to July 4, 1880, when his pay as chief engineer began. The claim amounts to nine thousand three hundred and fifty-one dollars and ninety-two cents ($9,351.92).

The claim is founded on section 16 of the act of July 16, 1862 (12 Stat. at L., 586). This section is as follows:

SEC. 16. And be it further enacted, That whenever any officer of the navy of a class subject by law or regulation to examination before promotion to a higher grade shall have been absent on duty at the time when he should have been examined, and shall have been found qualified at a subsequent examination, the increased rate of pay to which he may be entitled shall be allowed to him from the date when he would have received it had he been found qualified at the time when his examination should have taken place.

At the time this act was passed the law allowed one chief engineer to every steamship of war (5 Stat., 377). During the war the number of steamships of war increased so rapidly that there were always vacancies in the grade of chief engineers awaiting first assistant engineers who became qualified by two years of sea service to
12 enter that grade. Promotions could then immediately follow successful examinations. Indeed, successful examinations and promotions became in practice equivalent terms. Mr. Welles, Secretary of the Navy, therefore, advised the Fourth Auditor in unguarded language that it "be proper to consider first assistant engineers as entitled to an examination on the expiration of the term of sea service which the regulations require them to have performed and to allow them the increased pay from that date, if found qualified at their first examination subsequent thereto, and promoted."

The accounting officers followed this suggestion, and allowed a first assisstant engineer, when promoted to be a chief engineer, back pay as chief engineer from the time when his two years of sea service was completed. However erroneous this construction of the act of 1862 may have been, it practically resulted in no injustice to the Government at that time, because, as above stated, promotion always followed successful examination. But the act of July 4, 1864 (13 Stat., 393), limited the number of chief engineers to one for each steam vessel of the first and second rates. By the act of March 3, 1871 (section 1390, Revised Statutes), the number of chief
13 engineers was fixed at seventy.

In consequence of this legislation no vacancy in the grade

of chief engineers, to which the claimant was eligible, occurred until July 4, 1880.

The regulation by which first assistant engineers become eligible to examination for promotion, after two years of sea service, still remained, but such examination could not with propriety be made until a short time before promotion. If long periods were allowed to elapse between examination and promotion, the physical, intellectual, and moral character of the candidate might become in the meantime entirely changed. Thereafter examinations did not take place when the two years of sea service were completed, and not generally until vacancies had occurred or were about to occur.

The attention of the accounting officers does not appear to have been called to this change in the law and practice relative to promotions and examinations preparatory therefor, for they continued to allow back pay from the time when the two years of sea service was completed.

In 1877 the attention of Mr. Thompson, Secretary of the
14 Navy, was called to this practice. He came to the conclusion that either the accounting officers had misconstrued the letter of Secretary Welles, or that the Secretary had misconstrued the act of 1862. He advised that back pay should be allowed only from the time when a vacancy occurred, to which the absent officer could have been promoted if an opportunity for examination had been given him. From that time the accounting officers followed this construction.

Consequently the claimant, although he completed his two years of sea service October 25, 1868, but found no vacancy until July 4, 1880, received back pay only from the latter date. We are of the opinion that he was entitled to no more.

The act of 1862 refers to the "examination before promotion to a higher grade," not to a date when by some possibility an examination might have been made. The time intended is next "before promotion," not next after two years of sea service. The word "examination" is used in the statute, because examination must precede promotion, and while promotion could take place in the absence of the officer, examination could not.

The navy regulation upon which the claimant relies to aid
15 in his construction of the statute is as follows:

264. Candidates for promotion to the grade of chief engineer must have served at least two years at sea as first assistant engineer on board of a naval steamer.

This does not require an examination for promotion to take place as soon as the two years of sea service are completed, but forbids it to take place before; nor does it imply that an examination for promotion shall take place before there is any chance for promotion.

But the claimant's right to back pay under any construction of the act of 1862 is cut off by the act of June 22, 1874. The first section of that act is [as] follows:

That on and after the passage of this act any officer of the navy who may be promoted in course to fill a vacancy in the next higher grade shall be entitled to the pay of the grade to which promoted

from the date he takes rank therein, if it be subsequent to the vacancy he is appointed to fill. (18 Stat., 191.)

This act authorizes payment only from the time the promoted officer takes rank in the higher grade and subsequent to the date of the vacancy to which, in course, he is promoted.

16 The vacancy to which the claimant was in course promoted occurred July 4, 1880. He was, therefore, entitled to draw pay as a chief engineer only from that date. That has already been paid to him.

His petition must be dismissed.

VI. Final Judgment Dismissing the Petition.

GEORGE P. HUNT
vs.
THE UNITED STATES. } No. 14504.

At a Court of Claims held in the city of Washington on the 27th day of April, A. D. 1885, the court filed findings of fact in accordance with the agreement of the parties, and it was thereupon ordered that the petition of the said claimant be dismissed.

By the Court.

17 *VII. Application for and Allowance of Appeal.*

GEORGE P. HUNT
vs.
THE UNITED STATES, } No. 14504.

From the judgment entered in the above-entitled cause at the December term, 1884–'85, in favor of the defendants, the claimant, by his attorney, on this 29th day of April, A. D. 1885, makes application for and gives notice of an appeal to the Supreme Court of the United States, the claim in controversy exceeding the sum of three thousand dollars.

CHAS. F. BENJAMIN,
Attorney of Record.

Filed May 4, 1885.

And now to wit, May 4, 1885, it is ordered that the appeal be allowed as prayed for.

By the Court.

18 In the Court of Claims.

GEORGE P. HUNT
vs.
THE UNITED STATES. } No. 14504.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the Court, and the conclusion of law thereon, of the opinion of the Court, of the judgment of the Court dismissing the petition, of the application by the

claimant for an allowance of an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington, this 15th day of May, A. D. 1885.

[Seal: Court of Claims. Reipublicæ civibusque.]

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

Endorsed on cover: Court of Claims. No. 869. George P. Hunt, appellant, *vs.* The United States. Filed June 25, 1885.

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CLERK

Supreme Court of the United States.

OCTOBER TERM, 1885. No. 869.

GEORGE P. HUNT, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

Brief and Argument for the Appellant.

CHARLES F. BENJAMIN,
Counsel for Appellant.

WASHINGTON:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1885.

Supreme Court of the United States.

OCTOBER TERM, 1885.

GEORGE P. HUNT, APPELLANT,

v.

THE UNITED STATES.

No. 869.

Appeal from the Court of Claims.

STATEMENT OF THE CASE.

I. The Secretary of the Navy, May 12, 1864, addressed a letter to the Fourth Auditor of the Treasury, of which the following is the material part:

"There may be some obscurity in the wording of the 16th section of the act of July 16, 1862, to which you refer, but the evident and sole purpose of the law is to prevent an officer from being deprived by absence on duty of the increased pay which promotion would have given him. Since the commencement of the present war the examinations of engineers for promotion have not been at any regular periods. It will be proper, therefore, to consider them as entitled to an examination on the expiration of the term of sea service which the regulations require them to have performed, and to allow them the increased pay from that

date, if found qualified at their first examination subsequent thereto, and promoted." (Transcript, p. 3.)

II. The Fourth Auditor, Dec. 15, 1864, published the following regulations, which were approved by the Second Comptroller.

"90. * * A promoted officer of the navy * * if his promotion be dependent on passing his first examination after he was entitled, by regulation, to be examined for that purpose, his increased pay will commence on that date.

"91. If he be promoted in consequence of passing successfully his first examination for promotion, the increased pay, in that case, begins when he was, by regulation, entitled to be examined.

"112. By the 16th section of the act of 16th July, 1862, an officer of the navy absent on duty when entitled to an examination, and found qualified on a subsequent examination, is entitled to the increased rate of pay 'from the date when he would have received it had he been found qualified at the time when his examination should have taken place.'

"113. The Hon. Secretary of the Navy has given the following construction to that provision of law: 'It will be proper, therefore, to consider them as entitled to an examination on the expiration of the term of sea service which the regulations require them to have performed and to allow them the increased pay from that date, if found qualified at their first examination subsequent thereto, and promoted.'" (P. 3.)

III. The Navy Regulations of 1865 contained the following paragraph:

"264. Candidates for promotion to the grade of chief engineer must have served at least two years at sea as first-assistant engineer on board of a naval steamer." (P. 3.)

IV. The appellant completed two years of sea service, as a first-assistant engineer, Oct. 25, 1868. (P. 2.)

V. Upon the date named there were more chief engineers in service than the law authorized, and it was not till July 4, 1880, that a vacancy in that grade occurred to which appellant could be lawfully nominated. (P. 2.)

VI. The appellant was ordered to examination for promotion, was found qualified, was promoted Dec. 29, 1880, and was paid as a chief engineer from July 4, 1880. (P. 3.)

VII. The appellant prayed judgment in the court below for the pay of a chief engineer from the date when he completed his qualifying sea service as a first assistant, but the court dismissed his petition, whereupon an appeal was taken to this Court. (Pp. 1, 4, 7.)

ASSIGNMENT OF ERROR.

The appellant assigns for error the judgment of the court below that his petition should be dismissed.

BRIEF OF THE ARGUMENT.

I. At the time the appellant completed his qualifying service as a first-assistant engineer, the law was such as to vest in him a right to the rate of pay of a chief engineer from the date and by virtue of such completion.

II. The date whence such pay should be computed was not affected by the circumstance that, until he had been examined, passed, and promoted, he could not lawfully receive any pay as a chief engineer.

III. The existence or non-existence of a vacancy into which appellant could be lawfully promoted affected only the time when the higher rate of pay could be actually received, and not the time from which it should commence to run.

IV. When an officer has qualified himself for promotion, and there is no place into which he can be immediately promoted, it is not unreasonable that an increase of pay shall be provided for him in advance of his promotion.

V. Any right to increased pay which may have vested in the appellant by, and at the time of completion of, the qualifying service, was not affected by the provision of the act of 1874, recited in the opinion of the court below. (P. 6.)

I.

The act of Aug. 31, 1842, (5 Stat., 577, sec. 1,) is the organic statute so far as concerns engineers in the navy. That statute limited the number of chief engineers to one for each steamship of war, and though the mode of fixing the limit has been twice changed, the grade has never been unlimited, and the organic limitation remained unaltered until a date after that of the above quoted letter of the Secretary of the Navy.

The act of March 3, 1851, (9 Stat., 625, sec. 3,) shows that examination of assistant engineers for promotion was an established practice in the navy, and that examinations were held by classes, such being the obvious meaning of the language, "at the time others of his date were examined."

The act of July 16, 1862, (12 Stat., 586, sec. 16,) recognized examination as a prerequisite to promotion, and implied that the passing of an examination was to be followed by an increase of pay, but what qualification should precede an examination, or when increased pay should begin to run, was never matter of statutory provision until after the appellant had completed his qualifying service as a first-assistant engineer in 1868.

The letter of the Secretary of the Navy, recited in the statement of the case above, supplies the two omissions of the statute just noted. The letter says, in effect, that an engineer is entitled to an examination so soon as he has completed the regulation term of sea service, and that his increased pay is to commence upon the date of such completion, unless he shall fail to pass his first examination or shall fail of promotion. This construction of a statute which does not construe itself is valid.

United States v. *Macdaniel*, 7 *Pet.*, 1.
Edwards v. *Darby*, 12 *Wheat.*, 210.

It is found as facts that the appellant performed his regulation term of sea service and passed his first examination, and was promoted. (Pp. 2, 3.) Why, then, should he not be allowed increased pay from the date of completing the qualifying service, according to the construction of the statute cited? Reasons suggested by the opinion of the court below (p. 5) are that the language of the ruling of the Secretary of the Navy was unguarded, in so far as it did not express or imply a limitation which would prevent the increased pay from antedating the vacancy into which the officer should be promoted, and that this oversight on the part of the Secretary led the accounting officers into an error, through which they paid increased pay without regard to whether there was or not a vacancy during the time covered by the increase. But the Secretary's language does not wear an unguarded look, for he precedes it by an explanation that the exigencies of war had broken up periodical examinations of engineers for promotion, and he then proceeds to show what construction of the act of 1862 would enable the subjects of it to get the benefit intended by it. Put in homely phrase he said, in effect, this: Smith's

absence on duty has prevented his examination for promotion and the interruption of our periodical examinations prevents us from saying when he should have been examined had he been present, therefore consider that he should have been examined as soon as he had completed his term of sea service, and pay him from that time. We have already seen that regular examinations by classes were known as early as the date of the act of 1851, and the necessary implications of the act of 1862 inform us that increase of pay depended on these examinations. If a vacancy had anything to do with the increase of pay, why did not the act of 1862 use simpler and directer language, and thus point out the date of the vacancy as the initial point of the increase of pay? It is impossible to conceive that Mr. Secretary Welles did not mean what he said, or say what he meant. Nor is it likely that those scrutineers of the Treasury, the Auditor and Comptroller, would have fallen into or stayed for years in a net constructed of the supposed unguarded language of the Secretary. See the second volume of the digest of decisions of the Second Comptroller, paragraph 966, wherein, as lately as 1877, he ruled that the increased pay of a promoted officer began with the date of completion of the prescribed term of sea service.

The opinion of the court below holds (p. 6) that, while two years of sea service was the minimum qualification for examination, the completion of that term did not require an examination to be immediately held, which is true, but does not touch the ruling: "Consider them as *entitled* to an examination on the expiration of the term of sea service which the regulations *require* them to have performed."

That the Secretary of the Navy meant that the increased pay of a promoted engineer should be computed from the

date of his completing two years of sea service in the grade below seems clear. But the question remains whether such intent was consistent with the law. By the act of June 1, 1860, (12 Stat., 26, sec. 1,) specific rates of pay were fixed for each of the three grades of assistant engineer, a difference of rate being made between duty pay and leave or waiting order pay, but no provision is made as to when promoted pay shall begin to run and this is the only statute down to the date of the Secretary's ruling upon the act of 1862.

This same section of the act of 1860 fixes also the pay of *chief* engineers and, as to them, it provides an increase for each period of service of five years in that grade, until three increases have been had. Why are not similar increases provided in the statute for assistant engineers? Both classes would seem to come under the same principles and doctrines. The reason obviously is that there was no promotion ahead for a chief engineer, and longevity as a chief engineer was taken as the basis of an increase of pay to him, whereas assistants got an increase of pay by virtue of rendering a certain amount of sea service and afterwards passing an examination, so that they did not need the aid of longevity pay to keep their emolument from stagnating. This statute of 1860 affords strong moral evidence that the law of the service was just as expressed in the letter of Mr. Secretary Welles.

We have, however, evidence yet stronger and plainer in the act of March 3, 1873, (17 Stat., 555, sec. 1,) which is as follows:

* * "Naval officers subject to examination before promotion to a grade limited in number by law shall not be entitled to examination, in such a sense as to give increase of pay, until designated by the Secretary of the Navy to fill vacancies in the higher grade." * *

This statute is either a change of pre-existing law or regulation, or a vain flourish of words. Which must it be considered to be? If it were merely a declaratory statute, intended to rescue the pre-existing law from doubt or obscurity, the term of the future, "shall," would not be found in it. The opinion of the court below is silent as to this statute and its import.

It appears that up to the date of the Secretary's letter, May 12, 1864, there was no statutory prohibition of increased pay to an assistant engineer from the date of completion of qualifying sea service, so that the construction of law contained in that letter was good at its date. Shortly after that date, namely, July 4, 1864, an act was passed (13 Stat., 393, sec. 6) which resettled the pay of engineer officers and again preserved the distinction between chief and assistant engineers, in respect of longevity pay, that has been commented on already; and again left the commencement of promoted pay to regulation, by maintaining silence about it.

The act of July 15, 1870, (16 Stat., 331, sec. 1,) again remodelled the pay of engineers, and this time granted to assistants an increase of pay for longevity. The same statute (sec. 7.) contains this provision:

* * "Hereafter the increased pay of a promoted officer shall commence from the date he is to take rank as stated in his commission; but if an officer of a class subject to examination before promotion shall be absent on duty, and by reason of such absence, or of *other cause not involving fault on his part*, shall not be examined at the time required by law or regulation, and shall afterwards be examined and found qualified, *the increased rate of pay to which his promotion would entitle him shall commence from the date when he would have been entitled to it had he been examined and found qualified at the time so required by law or regulation*; and this rule shall apply to any cases

of this description which may have heretofore occurred."
* *

This statute is posterior in point of time to the accruing of appellant's right to an examination and therefore cannot he held to affect that right, except by necessary implication ; but if the contrary were the rule, the statute would aid his right by reason of the language put into italics.

In the case of assistant engineers examined as late as 1873, the Second Comptroller held that their promoted pay began from the dates when they completed their qualifying terms of sea service. (2 Dig. 2 Comp., par. 935-6.)

We believe it to be now made plain that prior to the act of 1873, quoted above, the law was that the promoted pay of an engineer began from the date of completion of sea service in the grade below, without regard to the date of the vacancy into which be might be promoted, and that that act, upon a familiar principle of law, impaired no right vested before its enactment. (2 Dig. 2 Comp., par. 936.)

The act of June 5, 1872, (17 Stat., 226,) repeals part of the act of 1870, above cited, but not the part that relates to cases like that of appellant; and if it did, the effect would be the same, since the act of 1870 does not operate upon appellant for reasons already suggested.

II.

Assuming it to be established that completion of the qualifying service gave a right to examination and a right to earn increased pay from date of such completion, it is immaterial that the right to *receive* the increased pay was postponed to the happening of two events, namely: passing the first examination held, and obtaining a promotion. Estates *in futuro* are among the familiar phenomena of the law, whether as to real or personal estates. Rights con-

tingent upon the happening or non-happening of events are just as familiar, and so is defeasance as the consequence of the non-happening of that which is essential to the fruition of a contingent right.

The most that can be made of the proviso in the Secretary's letter, "if found qualified at their first examination subsequent thereto and promoted," is an argument to the effect that if the Secretary had meant that the right to an examination, or to increased pay, was independent of a vacancy, he would not withhold payment of the increased pay till after promotion. But the answer to such an argument would be that the regulation never contemplated the giving of increased pay in consideration solely of performing two years' sea service in a particular grade. The party must have been capable for service in the grade above whensoever a vacancy should open the superior grade to him; the way to determine this capability was by an examination for promotion, and the objects of an examination could not be surely effected if a great period should elapse between examination and promotion, for the examinee might degenerate in the interval.

It seems plain that the scheme of the regulation was to give an increase of pay to an assistant engineer who had completed two years of service at sea, provided he should be fit for the higher duties which, sooner or later, he would be called upon to perform, and, in order to secure the *quid pro quo*, the increase was made contingent in the first place, and subject to defeasance in the second place. The plan looks as clumsy as some of the features of the British Constitution, but like that complex structure, it is a natural formation from the facts of the case.

III.

If two years sea service gave a right to examination for promotion, and the passing of the examination followed by promotion vested an indefeasible right to have the promoted pay run back to the completion of the sea service, it follows that the only figure to be cut by the existence or non-existence of a vacancy at the time of completing the service is the determination of the time when the right to increased pay shall become indefeasible and fruitful. The want of a vacancy when the party has finished his qualifying service cannot postpone the contingent, but only the actual enjoyment of increased pay. This proposition is too plain to need further argument.

IV.

Was it unreasonable that an assistant engineer should, under any circumstances, have prospectively or in possession the pay appropriate to a higher rank and duty than devolved upon him? Not necessarily so, we answer. An assistant engineer who had served two years at sea on board a naval ship was a more valuable officer than one who had not, and his services in any grade of the engineering corps were more valuable. From the time, in 1837, when the steam-frigate *Fulton* was put into commission, to the time during the civil war, when all sorts of steam craft were built, bought, or hired for the navy, steamships of war increased faster than assistant engineers could be passed through the grades of third, second, and first-assistant, to chief engineer, so that the limitation in the organic act of 1842 to one chief for each "steamship," prevented redundancy of that grade down to a time subsequent to the date of the Secretary's letter of 1864. Hence, down to such date, it was quite reasonable to say to an

assistant engineer, "If anything, not your fault, prevents your being examined and promoted as soon as you are ready for promotion, you shall lose nothing, for your increased pay shall run back to the time that you were ready." Possibly the Secretary ought to have qualified his letter by providing that there should be no increase of pay to antedate a vacancy, but he did not do so; the law did not so require until after the appellant's right had attached, and it is admitted in the opinion of the court below (p. 5) that the practice of the accounting officers until 1877 was to allow to each promoted engineer the pay of the new grade back to the time when he completed his qualifying sea service. If that practice was contrary to law, the appellant cannot now be aided by it, but to any argument of unreasonableness the practice of thirteen years may well be cited.

As assistant engineers were left without longevity pay till 1870, antedating their promoted pay was the only way of recognizing the claims of length of service.

V.

If the appellant should be held entitled to an examination on completion of the required sea service and, upon promotion, to have his increased pay rated back to the time of such completion, no defeasance of his right is effected by the act of 1874, for the simple and sufficient reasons that the statute is an enlarging and not a restricting statute, giving to those who have not instead of taking away from those who have, and that neither by express words nor by necessary implication does it take away any right already vested. The court below say of this statute, (p. 7,) that it "authorizes payment only from the time the promoted officer takes rank in the higher grade and subse-

quent to the date of the vacancy to which, in course, he is promoted," which statement is correct, but in no wise touches the question as to how this appellant's right, vested in 1868, is to be held as taken away by this non-retroactive statute passed six years later. It will be observed that the court below support neither by reasoning nor authority the application made of this statute to the present case. Other tribunals have held otherwise. Thus, the Second Comptroller held, as lately as 1877, that an officer in the situation of appellant should have his promoted pay from the date of completion of his sea service (2 Dig. 2 Comp., sec. 966.)

This act of 1874 (18 Stat., 191, sec. 1,) is remedial of the act of 1872, (17 Stat., 226,) because it grants increased pay to a promoted officer from the date of his new rank, if such date be subsequent to the vacancy; whereas the older act required that there should be also *performance of duty in the new grade* before increased pay should begin to run. But, for reasons already stated, neither act applies to this case.

To sum up, the following points in behalf of appellant are believed to have been made good herein:

1. The date whereon a promoted engineer's increased pay should begin was always matter of executive regulation, until after appellant had qualified himself for examination with a view to promotion.

2. The regulation, during all the period indicated, was that increased pay should begin from the date of completion of the qualifying sea service in the grade next below, unless the officer should fail in examination or of promotion.

3. The date whereon an assistant engineer acquired a right to be examined for promotion was always matter of executive regulation until after appellant had qualified himself for such an examination.

4. The regulation, during all the period indicated, was that the right to an examination vested upon completion of two years sea service in the grade next below.

5. The appellant's right to an examination vested; he passed his examination without delay or fault on his part; his right to receive promoted pay back to the date of completion of his qualifying sea service has attached, and there is no law acting retrospectively upon his right, so as to annul, impair, or modify it.

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In the Supreme Court of the United States.

OCTOBER TERM, 1885.

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BRIEF FOR THE UNITED STATES.

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BRIEF FOR THE UNITED STATES.

The opinion delivered by the Court of Claims in this case is so entirely satisfactory that we will not attempt to enlarge upon it. The appellant claimed that he was entitled to receive the difference between the pay of a first assistant engineer and a chief engineer from October 25, 1868, when he completed two years' of sea service, to July 4, 1880, when his pay as chief engineer began. The claim amounts to $9,351.92, and is based on section 16 of the act of July 16, 1862 (12 Stat. L., 586). That section reads as follows:

> SEC. 16. *And be it further enacted,* That whenever any officer of the Navy of a class subject by law or regulation to examination before promotion to a higher grade shall have been absent on duty at the time when he should have been examined, and shall have been found qualified at a subsequent examination, the increased rate of pay to which he may be entitled shall be allowed to him from the date when he

would have received it had he been found qualified at the time when his examination should have taken place.

In the language of the Court of Claims this act—

> Refers to the "examination before promotion to a higher grade," not to a date when, by some possibility, an examination might have been made. The time intended is next "before promotion," not next after two years of sea service. The word "examination" is used in the statute because examination must precede promotion, and while promotion could take place in the absence of the officer, examination could not. The Navy regulation upon which the claimant relies to aid in his construction of the statute is as follows:
>
> "264. Candidates for promotion to the grade of chief engineer must have served at least two years at sea as first assistant engineers on board of a naval steamer. This does not require an examination for promotion to take place as soon as the two years of sea service are completed, but forbids it to take place before, nor does it imply that an examination for promotion shall take place before there is any chance for promotion."

We submit that Mr. Secretary Thompson was right in saying that either the accounting officers had misconstrued the letter of Secretary Welles or that the Secretary had misconstrued the act of 1862. Whatever differences of opinion may have existed as to the proper construction of the act of 1862, it is clear, we think, that the claimant's right to back pay under any construction of the act of 1862 is defeated by the act of June 22, 1874. The first section of that act provides—

> That on and after the passage of this act any officer of the Navy who may be promoted in course to fill a vacancy in the next higher grade shall be en-

titled to the pay of the grade to which promoted from the date he takes rank therein, if it be subsequent to the vacancy he is appointed to fill (18 Stats., 191).

This act authorizes payment only from the time the promoted officer takes rank in the higher grade and subsequent to the date of the vacancy to which in course he is appointed. The vacancy to which the claimant was in course promoted occurred July 4, 1880. He was therefore entitled to draw pay as a chief engineer only from that date.

The record shows that in 1868 the claimant was a first assistant engineer in the Navy; that in that grade he served two years at sea on board of a naval steamer; that he completed his two years of sea service on October 25, 1868; and that at that time there was no vacancy in the grade of chief engineer to which he could have been promoted, nor did any such vacancy occur until July 4, 1880. He was ordered to examination for promotion to the grade of chief engineer on or about October 11, 1880, and was found qualified. He was promoted to the grade of chief engineer on December 29, 1880. He has received pay as chief engineer since July 4, 1880, and from October 25, 1868, to July 4, 1880, he was paid as a first assistant engineer.

Congress alone has power to fix the pay; its will only is to be ascertained. The Secretary of the Navy has no power by regulation to allow pay that is not provided for by statute.

Very respectfully,

JOHN GOODE,
Solicitor-General.

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